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No. 90-1265 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL P. OSHATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding from evidence certain documents that supposedly went to the bias of a government witness.

2. Whether it was reversible error for the district court to allow the prosecutor to pose guilt-assuming hypothetical questions on cross-examination of petitioner's character witness.

3. Whether it was reversible error to admit into evidence a chart summarizing government evidence.

4. Whether any other errors that may have occurred denied petitioner his right to a fair trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A77) is reported at 912 F.2d 534. Opinions of the district court are reported at 700 F. Supp. 696, 704 F. Supp. 511 (Pet. App. E143-E159), and 715 F. Supp. 74.

JURISDICTION

The judgment of the court of appeals (Pet. App. B78-B80) was entered on August 23, 1990. A petition for rehearing was denied on October 10, 1990. Pet. 2. The petition for a writ of certiorari was not filed until February 5, 1991, and therefore is out of time under Rule 13.1 of the Rules of this

Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a tax attorney, was convicted on one count of conspiracy to defraud the United States (18 U.S.C. 371), and 14 counts of filing false income tax returns, either for himself (26 U.S.C. 7206(1)) or for various partnerships (26 U.S.C. 7206(2)). Pet. App. A8-A9, C82. The district court sentenced petitioner to 40 months' imprisonment and three years' probation. *Id.* at A9.

1. The evidence at trial showed that between 1979 and 1983, petitioner assisted in the formation of a number of affiliated partnerships known as the "Monetary Group." The partnerships purportedly were set up to engage in securities transactions in which any losses would be available as tax deductions. Pet. App. A4-A7.

Many of the tax losses reported by the partnerships, however, did not arise out of legitimate trading. Pet. App. A7. Edward Markowitz, the head trader for the Monetary Group, testified that he falsified trade documents to reflect transactions that never occurred. *Ibid.* The partnerships also engaged in transactions that had no market risk and therefore could not generate valid tax losses. These transactions were documented fraudulently so that they would appear to give rise to valid tax deductions. *Id.* at A7-A8.

2. On appeal, petitioner contended, *inter alia*, that the trial court improperly excluded certain documents he offered during his cross-examination of Markowitz; that, in cross-examining petitioner's character witness, the prosecutor improperly posed hypothetical questions that asked

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[1] Simultaneously with the filing of his petition, petitioner filed an application for an extension of time within which to file the petition, but the application was returned as untimely.

the witness to assume that petitioner was guilty; and that the trial court erred in admitting a summary chart prepared by the prosecution. The court of appeals found that the district court had not committed any reversible error and therefore affirmed the convictions.[2]

a. The bulk of the court of appeals' opinion dealt with petitioner's argument that the prosecution's cross-examination of his character witness constituted prejudicial error. Pet. App. A10-A33.[3] The prosecutor asked the witness if her opinion of petitioner's character would be affected if she learned that petitioner had known that certain transactions were backdated. The witness replied, "Yes." *Id.* at A10-A11. Similar questions were asked and answered concerning other aspects of the wrongdoing for which petitioner was on trial. *Id.* at A11.

The court of appeals acknowledged that there was "arguably an ambiguity" as to the propriety of the prosecutor's questions under the Second Circuit's earlier decision in *United States* v. *Morgan*, 554 F.2d 31 (2d Cir.), cert. denied, 434 U.S. 965 (1977), Pet. App. A19, but agreed with petitioner that the cross-examination was improper. In its view, guilt-assuming hypothetical questions create too great a risk of impairing the presumption of innocence. Pet. App. A23. The majority also reasoned that when jurors have repeatedly heard a prosecutor assure the judge of his good-faith basis for asking other hypothetical questions, the jurors

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[2] The court of appeals also affirmed the convictions of petitioner's co-defendant, Leonard A. Messinger, who has not sought review by this Court.

[3] The government initially called the witness, but the defense adopted her as a character witness during cross-examination. Like petitioner and the court of appeals, Pet. App. A10, we will refer to the defense's questioning of this witness concerning petitioner's character as direct examination, and the prosecutor's questioning on the character issue as cross-examination.

might assume from a guilt-based hypothetical that the prosecutor has extra-record evidence of guilt. *Id.* at A23-A24.[4]

Turning to "traditional harmless error considerations," Pet. App. A31, the court nevertheless declined to reverse petitioner's convictions because it believed the prosecutor's questions created no substantial risk of prejudice. *Id.* at A31-A33. The court noted that the trial judge gave the jury appropriate cautionary instructions, in which it pointed out the limited purpose of this type of questioning and reminded the jurors that it was their responsibility to determine guilt or innocence. *Id.* at A31. The court also found the evidence of guilt "so substantial as to preclude any reasonable likelihood that the [questioning in dispute] contributed to the verdicts." *Id.* at A31-A32.

b. The court of appeals also rejected petitioner's argument that the trial court erred in excluding certain documents petitioner attempted to introduce during cross-examination of Markowitz, the head trader for the various partnerships whose affairs were in question. Pet. App. A41-A43. Markowitz testified on direct examination that he had forfeited all of his possessions to the government, including whatever money he had acquired through the partnerships. *Id.* at A41. Petitioner cross-examined Markowitz about several transfers of money he allegedly had made to family members or to family-controlled businesses. When Markowitz could not recall those transfers, petitioner sought to introduce extrinsic evidence of their occurrence. Because Fed. R. Evid. 608(b) limits the introduction of extrinsic evidence to support attacks on credibility, the district court

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[4] Judge Mukasey, who concurred in the judgment and in the other sections of the court's opinion, disagreed with the majority's reading of *Morgan* and concluded that the questioning was entirely proper. Pet. App. A46-A77.

refused to allow petitioner to introduce the evidence for that purpose. Petitioner argued that he was seeking to introduce the evidence to establish that Markowitz had a motive to testify falsely in favor of the government, so that the government would not seek forfeiture of the assets he had hidden. The trial court excluded the proffered evidence. Pet. App. A41-A42.

The court of appeals held that a fair review of the record reveals that the trial court understood it had discretion to admit the evidence regarding Markowitz's transactions, quoting the trial court's statement that the issue was "committed to the discretion of the trial court." Pet. App. A43. The court then concluded that exclusion of the evidence did not constitute an abuse of discretion in view of the wide-ranging cross-examination petitioner was allowed to conduct and the speculative nature of the theory under which the evidence was offered. *Ibid.*

c. Finally, the court of appeals rejected petitioner's argument that admission of the government's summary chart constituted reversible error because it was not provided to petitioner before trial and because it was published to the jury (although not admitted) before the government demonstrated the accuracy of the method by which it prepared the chart. Pet. App. A43-A45. The court held that petitioner was not prejudiced because he had ample time during trial to check the chart and cross-examine government witnesses concerning any errors, and because the chart was not actually admitted until all the errors on the chart were corrected. *Id.* at A45.

ARGUMENT

1. Petitioner first argues that the trial court violated the Confrontation Clause of the Sixth Amendment by excluding evidence petitioner claimed would prove that Markowitz had

a financial incentive to curry favor with the government. Pet. 27-39. Petitioner, however, offers no substantial reason to believe that the court of appeals erred, much less allowed the district court to transgress constitutional limitations, in limiting the introduction of extrinsic evidence with regard to Markowitz. Although petitioner claims that the trial court's ruling allowed the government to "hide its pecuniary arrangements with prosecution witnesses," Pet. 39, the evidence he sought to introduce did not relate to the government's arrangements with Markowitz, but instead supposedly would have documented transfers of money from Markowitz to relatives or to family businesses. Pet. App. A41-A42. The court of appeals correctly characterized as entirely speculative petitioner's theory that those purported transfers would show that Markowitz had a motive to lie on the stand. *Id.* at A43. As the court of appeals noted, *ibid.*, petitioner was accorded "wide latitude" in cross-examining Markowitz. The petition itself acknowledges that petitioner cross-examined Markowitz for "many hours," Pet. 38, asking "hundreds of questions," Pet. 36. This is simply not a case where the trial court cut off a whole line of questioning or otherwise unduly restricted defense attempts to cross-examine a government witness.[5]

2. Next, petitioner argues that the government violated petitioner's presumption of innocence because the prosecutor asked a defense character witness whether her opinion of petitioner's character would change if she were shown evidence that petitioner had engaged in various aspects of

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[5] Petitioner also argues that any Confrontation Clause error that occurred was not harmless. Pet. 33-38A. That question, of course, would be relevant only if the Court held that the Confrontation Clause had been violated. Because the court of appeals did not find such an error, it conducted no harmless error analysis.

the wrongdoing for which he was being tried.[6] Pet. 39-44. Although petitioner does not discuss the point, the courts of appeals do not agree on whether this type of questioning is proper. The Sixth and Seventh Circuits refuse to permit such questioning under any circumstances. See *United States* v. *McGuire*, 744 F.2d 1197, 1204-1205 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985) (in dictum); *United States* v. *Williams*, 738 F.2d 172, 176-177 (7th Cir. 1984). The District of Columbia Circuit permits such questioning if the witness is offering an opinion as to character, but not if the witness is testifying as to reputation of character. See *United States* v. *White*, 887 F.2d 267, 274-275 (1989). The Fourth, Fifth, Eighth, and Tenth Circuits have condemned asking these questions of reputation witnesses, but have not directly addressed whether such questions can be put to opinion witnesses. See *United States* v. *Siers*, 873 F.2d 747, 749 (4th Cir. 1989) (type of witness not entirely clear); *United States* v. *Candelaria-Gonzalez*, 547 F.2d 291, 293-295 (5th Cir. 1977); *United States* v. *Barta*, 888 F.2d 1220, 1224-1225 (8th Cir. 1989); *United States* v. *Polsinelli*, 649 F.2d 793, 795-797 (10th Cir. 1981); *United States* v. *Page*, 808 F.2d 723, 731 (10th Cir.), cert. denied, 482 U.S. 918 (1987).

Because he prevailed on this point in the court of appeals, petitioner has not presented this question to the Court for review. We agree with petitioner that the correctness of the court of appeals' ruling as to the propriety of the prosecutor's cross-examination of the defense character witness

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[6] The witness was permitted to testify about her opinion of petitioner's character. Before the adoption of the Federal Rules of Evidence, character witnesses in federal trials were permitted to testify only as to a person's reputation. Fed. R. Evid. 405(a) changed that rule to permit a character witness to testify as to the witness's opinion of a person's character. See generally 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5265 (1978).

is not properly presented here. Even if the Court were to address this point and resolve it in favor of the defendant, the judgment below would not be altered, because the court of appeals already has agreed with petitioner on the issue, but has determined that the error was harmless. For that reason, the sole question petitioner presents is whether the posited error indeed was harmless.

With regard to his harmless error point, petitioner does not seem to contend that an error of the sort the court of appeals found in this case should be *per se* grounds for reversal.[7] Instead, he argues that the court of appeals erred by finding that the alleged error was harmless on these particular facts. Although petitioner attempts to show that he was harmed by the district court's action in permitting the cross-examination in question, the court of appeals, after a full review of the record, was fully satisfied that there was no substantial risk of prejudice. Pet. App. A31-A32.

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[7] Nor would he find support for such an argument. The Court has held that reversal of a criminal conviction is not the necessary result of every minor error in a criminal trial. See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-257 (1988); *United States* v. *Hasting*, 461 U.S. 499, 509 (1983). In *Hasting*, the Court stressed that it "has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations * * *." 461 U.S. at 509. The Court also has explained that "deterrence is an inappropriate basis for reversal where 'means more narrowly tailored to deter objectionable prosecutorial conduct are available.'" *Bank of Nova Scotia*, 487 U.S. at 255 (quoting *Hasting*, 461 U.S. at 506).

Moreover, all five of the courts of appeals that have addressed the question in this particular context have concluded that errors of this type can be harmless. In addition to the decision in this case, see *United States* v. *Siers*, 873 F.2d 747, 749-750 (4th Cir. 1989); *United States* v. *Williams*, 738 F.2d 172, 177 (7th Cir. 1984); *United States* v. *Barta*, 888 F.2d 1220, 1225 (8th Cir. 1989); *United States* v. *Page*, 808 F.2d 723, 731-732 (10th Cir.), cert. denied, 482 U.S. 918 (1987).

It is clear that the trial judge was sensitive to the risk of prejudice. He forced the prosecutor on at least one occasion to rephrase his question when he thought the form of the question was overly suggestive. Pet. App. A15. The trial judge also gave appropriate instructions regarding the limited purpose for which the questioning was being permitted and reminded the jurors that they had the ultimate responsibility to determine the guilt or innocence of petitioner. *Id.* at A31. Furthermore, although petitioner contends that he chose not to call additional character witnesses because of the judge's erroneous ruling, the decision not to call these witnesses was petitioner's; the district court's ruling regarding the prosecutor's cross-examination did not in any way force petitioner to abandon his plan to call his proposed character witnesses. And it is highly unlikely that this type of cross-examination would have affected petitioner's rights any more with respect to the uncalled character witnesses than it did with respect to the witness who testified. In sum, in light of all the relevant circumstances, it is highly unlikely that the district court's error, if the court in fact erred, had any effect on the verdict. The court of appeals' conclusion that any error was harmless therefore was correct and in any event does not warrant review by this Court.[8]

3. Next, petitioner contends that the admission of the government's summary chart constituted reversible error. Pet. 44-47. Petitioner characterizes the figures on the chart

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[8] Although petitioner contends that the government engaged in "deliberate defiance" of prior Second Circuit precedent on this matter, and that the trial court "knowingly join[ed] with the government" in violating his rights, Pet. 42-43, the court of appeals saw it differently, acknowledging that the Second Circuit's prior decision on the subject was "susceptible to misinterpretation," that the government was entitled to urge its position, and that the district court could not be faulted for "misreading" of prior Second Circuit law. Pet. App. A32-A33.

as "glaring" and "erroneous" and suggests that the chart should not have been published to the jury until the government demonstrated its reliability. Pet. 46. The court of appeals acknowledged that the better practice would be to submit the chart to the defense prior to trial to give the defense an advance opportunity to analyze it. The court concluded that there was no prejudice in this case, however, because petitioner had ample time and opportunity during the trial to check the chart and to cross-examine government witnesses regarding its contents. Pet. App. A44-A45. Moreover, the prior conditional admission of the uncorrected chart could not have prejudiced petitioner. The chart, which related to the conspiracy charge against petitioner, originally reflected phony losses totalling $1.8 billion. Gov't C.A. Br. 111. The chart as corrected reflected phony losses of $1.6 billion. *Ibid.* The issue of defendant's guilt did not depend on whether the losses totalled $1.6 billion or $1.8 billion. Compare *United States* v. *Citron*, 783 F.2d 307, 317 (2d Cir. 1986) (reversing conviction for tax evasion where "the seemingly arbitrary figures" used in the government's summary chart were an important link in its case). Thus, petitioner was not prejudiced by the errors in the original summary chart.

4. Finally, petitioner complains in passing (Pet. 48) about "the improper introduction of unfairly prejudicial government proof and the failure to review jury improprieties." But petitioner has presented no separate argument concerning either of these two issues before this Court, and he thus should be deemed to have waived any right to have the Court consider them.

Assuming, however, that petitioner's description of the post-trial proceedings in his statement of the case, Pet. 18-22, sufficiently raises the juror misconduct issue, he has failed to present any evidence of misconduct. The alleged statement by a-juror that the jurors' minds were made up after

Markowitz testified, Pet. 19, is not evidence that premature deliberations occurred. The jurors could have told each other when deliberations began that they had previously made up their minds, and it is purely speculative to assume otherwise.

Nor is there any merit to petitioner's claim that a juror's request to be excused on the Chinese New Year because of family obligations that would "forbid" him from deliberating that day, a note by the jury asking permission to adjourn at 1:00 p.m. to accommodate that juror, and the jury's verdict at 12:55 p.m. that same day constitute evidence of improper outside influence on the jurors. Pet. 20-22. That sequence of events provides no evidence at all that any outside party tried to influence the verdict in any way. Nor does it demonstrate improper coercion of the jurors by the trial court. See *United States* v. *Blackmon*, 839 F.2d 900, 915 (2d Cir. 1988); *United States* v. *Graham*, 758 F.2d 879, 883-885 (3d Cir.), cert. denied, 474 U.S. 901 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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